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April 24, 2018

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LETTER DECLINING PROSECUTION AFTER INVESTIGATION

RE: *Officer-Involved Shooting on October 16, 2016, by Austin Police Department Officers Deborah Lindeman (APD # 7551) and Richard Smith (APD # 7639)*

Dear Chief Manley:

The Office of the Travis County District Attorney has reviewed the Austin Police Department Special Investigation Unit (APD SIU) investigation of the above-referenced matter and concluded our independent review of the officer-involved shooting in which Austin Police Department Officers Deborah Lindeman and Richard Smith fired shots from their rifles that resulted in the death of Micah Jester. This letter is to inform you of my decision to decline prosecution of criminal charges against Officers Lindeman and Smith. My decision does not limit or address administrative action by the Austin Police Department, or other civil actions, where non-criminal issues may be reviewed and where different rules and lower levels of proof apply.

The District Attorney's Office has reviewed the investigation of the Austin Police Department into this incident pursuant to the officer-involved shooting protocol that is attached and posted on the DA official website. A copy of this letter will also be posted on the DA official website.¹

Based upon the evidence available and the applicable Texas law,² I am convinced that a jury following the law would not convict Officers Deborah Lindeman and Richard Smith, because the evidence proves the use of force to be justified under Texas law. The following sets forth the facts determined during our review, identifies the applicable legal rules, and presents the analysis underlying my opinion.

¹ <https://www.traviscountytx.gov/district-attorney/cru>.

² In arriving at this conclusion, I have relied upon the legal guidelines governing the use of force/deadly force in Texas as set forth in sections 9.32, 9.33 and 9.51 of the Texas Penal Code, the case authority construing that provision, and the United States Supreme Court case authority governing law enforcement use of force.

I. FACTS AND CIRCUMSTANCES LEADING TO AND SURROUNDING MS. JESTER'S DEATH

Critical to our analysis is the determination of the facts and circumstances leading to and surrounding a shooting incident. In determining these facts and circumstances, we rely on the entire investigative file compiled by APD's Special Investigations Unit³ (SIU) whose primary responsibility is the independent investigation of all shooting incidents in which an APD officer is involved. In determining the credible facts and circumstances leading to and surrounding the shooting incident resulting in Ms. Jester's death, we reviewed the entirety of SIU's investigative file to arrive at what we believe is a credible and comprehensive understanding of those facts and circumstances. Our narration of the facts and circumstances of Ms. Jester's death is based on our review of supplements and the written and audio statements made by the officers directly involved in this incident—Officer Lindeman and Officer Smith—as well as other officers who were witnesses. Our narration of these facts and circumstances is also based on a review of the statements of civilian witnesses, audio and video recordings, audio- and text-recorded 911 calls, APD radio traffic recordings, evidence recovered and developed at the scene, and forensic analyses conducted on recovered evidentiary items. We will set forth the facts and circumstances surrounding Ms. Jester's death based on our review of the credible evidence and information developed in the SIU investigation.

A. The Initial Emergency 911 Call and Dispatch of Officers

1. 911 Call for Welfare Check and Possible Domestic Violence

At approximately 3:44 a.m., on October 16, 2016, a young man placed a 911 call to Austin Emergency Services requesting law enforcement assistance, reporting a possible domestic dispute in progress and requesting officer assistance for a welfare check.⁴ The caller, a resident at an Austin apartment complex located at 744 W. William Cannon, was not clear whether he was making a welfare call or whether the call involved a possible domestic violence situation with his wife, or both. The wife the caller was referring to was Micah Jester, the decedent.

At various points throughout the call, the caller and Ms. Jester were heard arguing. Almost immediately, whether Ms. Jester was armed with a weapon complicated any determination of the exact nature of the disturbance. A review of the 911 call illustrates the difficulty the Call taker had in determining exactly what information to relay to responding officers.⁵ The following exchange occurred at the beginning of the call:

(Caller) [I]...need to put my spouse into hospital; like, in the psychiatric ward.

(Call taker) And what are they doing exactly?

(Caller) Uh, what is she doing?

³ APD's Special Investigations Unit (SIU) has the primary responsibility for conducting all "criminal investigations involving all sworn peace officers alleged to have committed a criminal offense within the jurisdiction of the Austin Police Department." See <http://www.austintexas.gov/departments/special-investigations>.

⁴ SIU detectives assigned to investigate the shooting canvassed the apartment complex, located and interviewed over twenty civilian witnesses who were residents of the apartment complex and had information relevant to the incident. Of those witnesses, several reported hearing what they described as "arguing" shortly before hearing the initial series of shots were fired. One of these witnesses, who lived next door to the caller, identified the caller and Ms. Jester as the two he heard arguing, stating that "[a]t about 3:45 a.m. I heard the couple that live next to me start arguing."

⁵ The recitation of the 9-1-1 call is taken from the transcription of the entirety of the call.

(Call taker) Yes. What kind of behavior is she showing right now?

(Caller) I was asleep, middle of my sleep. She's been acting like this for a while...

At this point in the call, a baby can be heard crying in the background.

(Call taker) So, what exactly is she doing? Does she have a weapon or anything?

(Caller) (Pause) She has a weapon. Just, she's just not acting right, she's not acting right.

The caller did not go into further detail about what in Ms. Jester's behavior prompted his 911 call. When the Call taker attempted to have the caller identify the weapon that Ms. Jester was armed with, the following exchange occurred:

(Call taker) What kind of weapon does she have?

(Caller) She does not have no weapon; she's just not acting right.

Concerned, the 911 Call taker sought to clarify whether Ms. Jester was, in fact, in possession of a weapon. The Call taker asked the caller, "What does that mean?" Yet the caller did not clarify whether Ms. Jester, in fact, had a weapon. At approximately two minutes and twenty seconds into the 911 call, the Call taker informed the caller that APD officers were dispatched.

Throughout the call, the Call taker could hear a baby crying in the background. Also, throughout the call, the caller was alternately addressing the Call taker and the then-still-unidentified Ms. Jester.⁶ At approximately two minutes and forty-four seconds into the call, the caller began a series of requests for Ms. Jester to put the baby down. The following exchange illustrates how the caller pleaded with Ms. Jester:

(Caller) ...[Y]ou put her down. Micah, please put her down, please, please.

(Ms. Jester) I'm not going to do anything to her.

(Caller) Please, put her down. Don't do this.

After the Call taker asked the baby's age, the caller informed her that the baby was ten months old. The caller was next heard requesting, "Micah, please put her down." Much of the remainder of the caller's call was ambiguous as to the details of exactly what was taking place and whether Ms. Jester, in fact, had a weapon. At approximately four minutes into the call, Ms. Jester instructed the caller, "Get away from me," to which the caller responded, asking Ms. Jester, "Put our daughter down. Please, put her down." The caller was then heard saying "Don't do this..."

Now concerned about the safety of the child, at approximately four and half minutes into the call, the Call taker begins asking whether the child is in harm's way, but got no clear response.

⁶ It was not until approximately seven minutes and twenty-five seconds into the call that the caller identified the person for whom he was requesting assistance as "Micah Jester," providing her date of birth to the Call taker. Only then was the call taker able to identify her and obtain critical biographical information, including arrest history.

2. Shooting Incident No. 1: Officers Lindeman and Smith are confronted by Ms. Jester in Possession of an Apparent Handgun, and Officers Discharge their Weapons⁷

At approximately five minutes and forty-five seconds into the 911 call, when Austin Police Department Officers Lindeman and Smith were approaching the caller's apartment, the following exchanged occurred on the 9-1-1 call:

(Caller) She has a gun.

(Call taker) What kind of gun?

(Caller) Not sure.

(Call taker) And, is she pointing the gun at you or to the baby?

(Caller) *It's hidden, can't see what it is; looks like an automatic.*

(Caller) But she's actively holding the gun in her hand?

(Call taker) No.

[Inaudible]

(Caller to Ms. Jester) You're not taking my daughter with you, put her down.

Again, the Call taker, who was updating the call for the APD officers who would be responding, asked "Does she have a gun anywhere near her?" The caller acknowledged that Ms. Jester was in possession of a gun, and responded that she has the gun but it is "not out, just..."

The final series of exchanges prior to the arrival of APD officers indicates an increasingly-distressed caller and an increasingly-distressed and distraught Ms. Jester. On the call, Ms. Jester can be heard screaming at the Call taker, instructing him to "get away from me," while the two continued to argue about the child.

For the remainder of the call prior to the arrival of officers, the caller remained on the telephone with the Call taker, but his attention was almost entirely directed at Ms. Jester and he was generally non-responsive to the Call taker's attempts to determine what was transpiring. At approximately eight minutes and forty-five seconds into the call, the caller was heard saying, "Don't fucking do that. Put that shit back in there. Don't do it."

The Call taker tried to get the caller to describe what Ms. Jester was doing, but the caller would not respond to her and instead continued to tell Ms. Jester, "Don't do it." Because the Call taker had to continue updating responding officers, the caller's increasing distress prompted the Call taker to redirecting her focus on the status of the gun:

(Call taker) What is she doing? Does she have a weapon in her hand?

[No response]

⁷ There were two series of shots fired, separated by approximately three minutes. The initial series of shots involved both Officers Lindeman and Smith discharging their weapons. The second series of shots involved Officer Lindeman only.

(Caller to Ms.
Jester) Don't be stupid. Now, lock the door!

(Call taker) Does she have a weapon in her hand?

[No response]

At this point, Ms. Jester had left the caller's apartment and walked out of the breezeway leading from the caller's apartment building. Officer Lindeman and Officer Smith had arrived at the complex and were approaching the caller's apartment. Moments later, at approximately nine minutes and fifty-four seconds into the 911 call, the caller is heard on the 911 recording saying, "Oh, my God. Oh, my God."⁸

Officer Lindeman was one of several responding officers who heard the dispatch following the 911 call. Officer Lindeman⁹ noted that the call was categorized as a "Priority Two"¹⁰ call and that it was the only one in queue in her district involving a possible mental health issue. Because she was a trained mental health officer,¹¹ Officer Lindeman self-assigned to the call. Also responding to the dispatch was Officer Smith.¹² Officer Smith understood the initial call to be a welfare check and decided to respond since he was in the vicinity of the call's location. Both Officer Lindeman and Officer Smith continued to monitor updates to the call as they drove to the location.

While in route, both officers monitored updates to the call. Initially, Officer Lindeman understood that Ms. Jester had a gun in her hand. In a separate update, Officer Lindeman heard that the gun was "hidden." At this point, Officer Lindeman believed that the gun was *not* involved and that the call was a welfare check for the caller's wife who was acting "strange or weird." Officer Lindeman stated:

558 So - so the call text keeps going as I'm trying to figure out where I'm
559 going. And to me it sounded like that call taker wasn't able to really
560 speak directly to the complainant. To me - I felt like they were
561 overhearing all the information that they were giving us. Um, and I say
562 that because one of the call texts said something like, um, "Can hear a
563 - can hear an argument in the background. Says that wife is holding a
564 baby." Um, so I don't know. It - for some reason in my mind we were
565 not getting to ask direct questions.

However, towards the latter portion of the call, the caller told the Call taker that Ms. Jester *was*, in fact, in possession of a "gun." As a result, Call takers updated the call to "urgent" and notified responding

⁸ Shortly before this statement, at approximately nine minutes and forty-eight seconds into the 911 call, five or six short "pops" can be heard. We reasonably conclude that this was the sound of Officers Lindeman and Smith discharging their weapons.

⁹ At the time of this incident, Officer Lindeman had been a member of the Austin Police Department for a period of three years. She completed APD's training academy in 2013 and was commissioned in December 2013. On the day of this incident, Officer Lindeman began her shift at 8:30 p.m. Neither Officer Lindeman nor Officer Smith had been involved in any officer-involved shootings prior to the incident involving Ms. Jester.

¹⁰ Priority 2 calls are classified as "incidents... [t]hat pose both a minimal or no immediate threat ... and ... [t]hat are in progress or just occurred; ...and (3) [w]arrant a rapid police response." See APD General Orders 2017-4, § 440.3.3 at https://www.austintexas.gov/sites/default/files/files/Police/APD_Policy_Manual.pdf.

¹¹ At the time of this incident, Officer Lindeman was Crisis Intervention Team (CIT) certified. As a CIT-certified officer, Officer Lindeman had completed training to more effectively respond to calls involving people experiencing mental health crises.

¹² At the time of this incident, Officer Smith had been a member of the Austin Police Department for a period of three years. He completed APD's training academy and was commissioned in March 2014. On the day of this incident, Officer Smith began his shift at 6:00 p.m.

officers that the caller “now states suspect has a gun, unknown description.” Officer Lindeman described her impressions as she learned of the most recent updated call while parking her vehicle:

569 A: Um, it did come out that the - the wife is holding a baby. The baby is 10
570 months old. Um, and then as I'm almost goin' 23 into the apartment
571 complex - not where I eventually park - they say that there's a gun.
572 And it's, like, okay, um, which still wasn't really alarming because a
573 lotta times that's, like, one of the questions, you know? Is there a
574 weapon in the home or are there pets in the home - those kinda things
575 - and so, um, and they - they had also updated me to the fact that all

Yet Officer Lindeman still believed that the gun was in the house. As she recalled in her post-incident interview, “They’re saying that the gun is hidden and that’s all.” Upon her arrival, she was “interested that was there’s a gun in the house somewhere that they keep and it’s not, I felt like it was not in play at that point.”¹³

Officer Smith also recalled the difficulty in determining the role the gun played based on the 911 call:

378 [REDACTED] Put the baby down. Um, as I get closer to 744 West
379 William Cannon, um, I'm not that far away probably... I want to say - I
380 don't - for some reason this intersection Emerald Forest and William
381 Cannon comes to mind when the call updates that the wife has a gun.
382 Um, the complainant says, um, wife has a gun on her and then I think
383 immediately after that a call text said well now the gun is hidden. And I
384 recall my Corporal - Corporal Shand Frank 780 asking over the radio if
385 we could get clarification if she did have a gun on her or if there was a
386 gun that was hidden in the house. Um, so it was kind of - it was- it was
387 unclear at the time if she still had the gun on her. 'Cause the first call
388 text says she has the gun and the second call text says the gun is
389 hidden. So I don't remember ever hearing any updates in reference to
390 that after that. Um, 'cause I got into the complex shortly thereafter. And
391 I think also about that same time the call got upgraded to a gun hot
392 shot. Just based off those- those two call texts.

Like Officer Lindeman, prior to his arrival Officer Smith believed that Ms. Jester had a gun and believed it was hidden.

Officer Lindeman was the first to arrive at 3:51 a.m., while Officer Smith arrived within a minute at 3:52 a.m. The officers parked their vehicles along the eastern boundary of the apartment complex. After parking his patrol vehicle, Officer Smith located Officer Lindeman and they began walking towards the caller’s apartment building, building 14. Because of the updated reports concerning the gun, both officers had unholstered their duty weapons and were carrying them as they approached the building.

¹³ *Id.* at 13.



Figure 1—Officers Lindeman and Smith's approach to caller's apartment.

It was during their approach to the caller's apartment building that Officer Lindeman and Officer Smith encountered Ms. Jester. Officer Lindeman described the circumstances leading up to their initial encounter with Ms. Jester and Officer Lindeman's decision to discharge her weapon:

609 [REDACTED] - once I was out of my vehicle. I said, "I'm out of my vehicle. I
 610 need you to go with updates over the air." Just so dispatch knew that I
 611 was no longer reading this call text. Um, when - okay so have Garrett
 612 and we're walking, um, we're walking up in the parking lot and I mean I
 613 don't - we weren't walking tactically, you know? It wasn't like we were
 614 stacked in. We were - we were walking up. Um, still felt like the gun
 615 was not in play at this point. Dispatch in my mind says something to
 616 the effect of, "The gun is in her hand." Um, and just real - 'cause I still
 617 felt like she was holding the baby too because that was, like, the last
 618 thing that I'd heard that she was doing. Anyways, um, the gun -
 619 something to the fact that the gun or the weapon is in her hand. And at
 620 that moment in my mind I registered that the gun is in play and that this
 621 suicidal female has the weapon...

Officer Smith's recollection of the events leading up to their initial encounter with Ms. Jester corresponded with Officer Lindeman's report:¹⁴

¹⁴ SIU conducts the more in-depth officer interviews with each officer separately and several days after the incident pursuant to APD policy and procedure.

380 [REDACTED] for some reason this intersection Emerald Forest and William
381 Cannon comes to mind when the call updates that the wife has a gun.
382 Um, the complainant says, um, wife has a gun on her and then I think
383 immediately after that a call text said well now the gun is hidden. And I
384 recall my Corporal - Corporal Shand Frank 780 asking over the radio if
385 we could get clarification if she did have a gun on her or if there was a
386 gun that was hidden in the house. Um, so it was kind of - it was- it was
387 unclear at the time if she still had the gun on her. 'Cause the first call
388 text says she has the gun and the second call text says the gun is
389 hidden. So I don't remember ever hearing any updates in reference to
390 that after that. Um, 'cause I got into the complex shortly thereafter. And
391 I think also about that same time the call got upgraded to a gun hot
392 shot. Just based off those- those two call texts.

393
394 Q: Okay.

395
396 A: Um, um, I remember that they kept wanting to hold the air for us. But I
397 know Lindeman was already in the complex but she hadn't made or
398 approached to the- to the apartment building itself. Um, so I told
399 dispatch hold off on that and let us- let us get there. Let us see what
400 we got. Let us work it first. Um, before we- before we do that. Officer
401 Lindeman's vehicle is parked on the north side of the complex
402 northeast side of the complex closer to South 1st exit for the complex. I
403 pull in behind her vehicle, um, and I get out and I start walking around
404 her vehicle to the front of it back around the - I guess the driveway into
405 the parking lot that is- that was- is right there. Um, in front of building

406 14. We both link up. I- I don't know the name- I don't know the number
407 of the building but it's the one that we park our vehicles directly next to.
408 We link up on the east side of that building kind of in the driveway into
409 that parking lot. And just based on the nature there, you know, there
410 was, uh, information that there was a gun involved. Um, we drew our
411 duty weapons at that time. Um, we started walking through the parking
412 lot. Um, talking about the location of the actual apartment that we were
413 going to. Yeah I- I remember Lindeman saying something to the effect
414 I think it's on the bottom left, um, and we were just talking about okay
415 where the- where the apartment was. And it wasn't long after that, um,
416 you just see this female come running out of the breezeway, um,
417 screaming, "Shoot me. Shoot me. Kill me. Kill me." And as she's
418 running out. I can see she's coming out like this and getting into a good
419 fir- shooting position. And I'm looking right at her. The gun and her is
420 pointed right at me. Um, I recognize a threat. I'm in between some
421 parked vehicles at this point. I know I break a little right and Officer
422 Lindeman is off to my left-hand side. I'm not exactly sure where she is
423 but I know she's to my left.

424

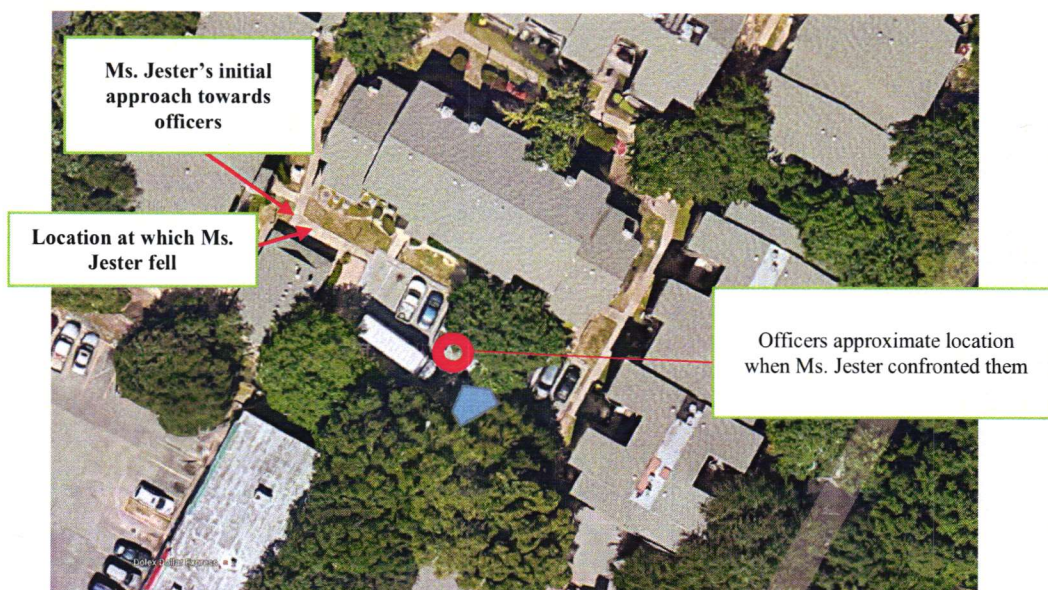


Figure 2—Officers' general location when confronted by Ms. Jester.

As they recalled, it was only after seeing Ms. Jester approaching them from building fourteen's breezeway that both officers discharged their weapons. After the officers shot, Ms. Jester fell on the sidewalk in front of the laundry room. The investigation following this incident indicated that Officer Lindeman fired four shots while Officer Smith fired five shots in the first series of shots. After firing the weapons, the officers radioed for emergency medical services and a K9 unit to assist with making an approach and securing Ms. Jester.

Several of the apartment residents recalled hearing Ms. Jester tell Officers Lindeman and Smith to shoot her or kill her, prior to hearing the initial shots. The residents' statements correspond to Officer Lindeman's recollection that as she exited the apartment building's breezeway, Ms. Jester was screaming at them to just "shoot me."

3. Shooting Incident No. 2: Officer Lindeman Discharges Her Weapon a Second Time following Ms. Jester's Attempts to Gain Control of Weapon

After Ms. Jester fell to the sidewalk, neither Officer Lindeman nor Officer Smith had a clear view of her. This was due to a number of factors: the lighting;¹⁵ the location of the officers; the location at which Ms. Jester fell; and physical factors, such as the layout of the complex and elevation differences.¹⁶ These factors made the officers unable to see the location of the weapon Ms. Jester had been pointing at them when she emerged from the breezeway. Consequently, identifying the weapon's exact location was the goal following the initial shooting incident.

¹⁵ See § II A (2) at p. 16, below, which addresses the likely lighting conditions existing at the time of this incident based on Officers Lindeman's and Smith's reports, and the Crime Scene Processing team's re-creation of those post-incident lighting conditions.

¹⁶ An inspection of the location from which Officers Lindeman and Smith discharged their weapons and at which Ms. Jester fell indicate that the latter was elevated, further obscuring visibility.



Figure 3--Officers Lindeman and Smith's approach, indicated by red arrows, to Ms. Jester's position after initial shooting.

Officer Smith described the officers' initial efforts to locate Ms. Jester's weapon:

481 Officer Lindeman comes over to my position and we link up there, um,
 482 I can't see where the gun is at this point, um, I know at this time we're
 483 callin' that- that there were shots fired. Um, I think Lindeman as we got
 484 closer advised that the suspect was down. Um, we link up and we
 485 begin moving along, um, the building 13 along tha- that building. And
 486 because I can't - she's still showing movement. I can't see where the
 487 gun is at. I can't see if she still has control of the gun or if the gun fell
 488 off to the side or where it was. So we make the decision to push up,
 489 um, keeping lethal coverage on her - meaning our guns are drawn.

However, as the officers moved westward along building thirteen, Officer Lindeman turned on her tactical light and was able to see the gun near Ms. Jester's right hand. Shortly afterwards, Officer Smith was able to see Ms. Jester's weapon. Officer Lindeman recalled Officer Smith's first sighting of Ms. Jester's weapon:

695 some point during this - this is where it kinda - I guess my timing might
 696 be a little - but Garrett moves - moves off of my position, moves further
 697 out, and this is when we first - like, I tell him - I'm like, "There is a gun.
 698 There's the gun. It's right there." Um, and he says, "Okay, yeah. I have
 699 eyes on it." He was kinda by that laundry room. He said, "Yeah I have
 700 eyes on the gun. Okay." And he moves back to me. And I think he
 701 moved to that position just to get a good visual...

Officer Smith also reported that he was then able to partially see Ms. Jester's weapon:

493 [REDACTED] Um, when we move around I can see that the
 494 gun is underneath her abdomen. She's laying on her right arm and I
 495 can't see where her right hand is. So I- I can only see a portion of the
 496 gun. I can't see the whole gun and I can't see where her right hand is.
 497 So I can't tell if she still has control of it or not or if it's just laying
 498 underneath her abdomen at this point. She's still moving so still
 499 perceive her as a threat. Um, so we make the decision once we get in
 500 position on the opposite side of her to hold what we got, um, and wait
 501 for more officers to arrive on scene. We're giving commands still at this
 502 point. I'm tellin' her, um, "Take your right arm out from you- take your
 503 right arm out. Take your right arm out." [REDACTED]

However, significant to the second series of shots, Officer Smith noticed that "[s]he's still moving" and, consequently, that both he and Officer Lindeman "still perceive[d] her as a threat." Both officers noticed and that Ms. Jester's movement was directed towards gaining control over the weapon they had seen lying near her right hand:

669 see the gun. It's by her right hand." Um, and just - and - and as we
 670 were moving, um, her body is - is moving but it's just like her - her back
 671 leg, like, kinda - kinda like this. Like, I could tell that she wasn't gonna
 672 get up, you know what I mean? But she was trying to move but I - I
 673 couldn't really figure - figure out what she was, you know, I don't know
 674 what she was doing. But her - her back le- I just remember seein' her
 675 back leg kinda up to her hip kinda moving like that. [REDACTED]

Officers Lindeman and Smith perceived that the threat Ms. Jester posed by attempting to gain control of the weapon was compounded by the distance between them:

514 residents that had come out. So we're yelling at her. We're yelling at
 515 the residents to get back in your apartments. "Get out of the way.
 516 There's an armed subject here. Get out of the way. Get back in your
 517 apartments." Um, we still perceive her as a threat because, you know,
 518 not knowing where her hand is I'm still under the impression that she
 519 has control of that gun and with her still moving, you know, we
 520 perceived her as a threat that, you know, she could turn and shoot-
 521 shoot one of us. 'Cause at this point we're probably about 20 - 25 feet
 522 away from her. Just- just due to the surroundings and the buildings and
 523 the confined space that we were operating in we had to- we had to be
 524 that close. Um, so we're- we're giving her commands. [REDACTED]

Officers Lindeman and Smith commanded Ms. Jester to show her hands and to move her hands away from the weapon which was in that moment within her immediate reach. Ms. Jester did not comply with their commands; she continued to move her hand directly towards the weapon.

Within minutes, additional APD backup officers had arrived at the scene to assist Officer Lindeman and Officer Smith. Among these officers were Officer Scott Arthurs (APD # 7041) and Corporal David Shand (APD # 5671). Upon his arrival, Corporal Shand informed the other officers on-site that he had a tactical ballistics shield in his patrol vehicle that the officers could use for cover. They formed a react team in order to safely approach Ms. Jester, given her attempts to gain control over the weapon lying next to her. At the point of their closest distance from Ms. Jester, as Officer Lindeman recalled, officers were within 20-25 feet of the location where Ms. Jester had fallen and was then lying. As did

Officers Lindeman and Smith, Corporal Shand reported that he saw "what [he] believed was a black semi-automatic handgun" lying on the sidewalk near Ms. Jester.

With Corporal Shand in the lead position, Officers Lindeman, Smith, and Arthurs approached Ms. Jester's position. As they began to approach her, she moved towards the weapon lying near her, eventually touching the weapon to gain control of it:

744 right in front of me. He's got the shield. He's single-handed on his
745 pistol and - and we're now still standing in front of the suspect. And it
746 seems like - once again my time - timing - but what it seems like is -
747 when he moved into position she starts being able - being able or - or
748 decides - she starts moving her right hand. And - and I - the
749 commands at that point get more specific as, "Do not move towards
750 the gun," or, you know, we're tellin' her, "Do not touch the gun." Um,
751 some- something to that effect. And she reaches out and she touches
752 the weapon but she doesn't - she's not able to get it in her hand or she
753 doesn't put it in her hand at that point. But it's real quick. So - so she

Officer Smith reported his recollection of Ms. Jester's touching of the weapon following the formation of the react team as follows:

534 and we're able to get up a hasty react team with the shield. Um,
535 Corporal's up front with the shield. Officer Lindeman is second. I'm
536 third. And Officer Arthurs is behind me. Um, she starts moving more
537 than what she did, um, meaning that she started manipulating the gun
538 at this point with her left hand. We're yelling at her numerous times
539 "Get your hands above your head. Get your hands above your head.
540 Don't touch the gun. Don't touch the gun. Hands above your head.

541 Don't touch the gun." Still yelling at people coming out. Telling them to
542 get back in their apartments. Um, she starts moving the gun with her
543 left hand. She gets it out from underneath her- her abdomen. And she
544 starts rotating the gun - the barrel of the gun back towards the direction
545 of where our react team is set up. We're telling her, "Hands above your
546 head. Don't touch the gun. Don't touch the gun." She gets the barrel
547 almost all the way back to, um, she's getting it back to where we're,
548 um, set up and the react team and I see her hand left hand going like
549 it's gonna - the fingers going in the- the trigger well - on the trigger.
550 Um, and that's when Officer Lindeman fires the, uh, the other shots.
551 That- those shots basically, um, incapacitate her. She no longer has
552 control of the gun. The gun kind of like is off to the side a little bit. It's

Officer Lindeman's description of the second shooting incident corroborates Officer Smith's description. Corporal Shand also recalled that he "saw [Ms. Jester's] left hand move slowly as if she was possibly trying to pick the gun up." At least one of the apartment residents recalled seeing Ms. Jester moving while she was lying on the sidewalk.

Prior to the second discharge of her duty weapon, and after seeing Ms. Jester touch the weapon for the first time, Officer Lindeman stated that she had told the members of the react team that she would fire for a second time if Ms. Jester attempted to gain control of the weapon. When Ms. Jester touched the weapon, Officer Lindeman discharged her duty weapon for a second time. Officer Lindeman recalled the facts and circumstances leading to the second series of shots, and recalled that informing her fellow officers in the react team that:

760 [REDACTED] Um, so she had - she had reached for it. She had
 761 touched it. And I said, um, and I know I just listened to the video - I,
 762 you know, in my mind I said something like, "If she - if she touches the
 763 weapon again or if she grabs at the weapon again I'm gonna fire." And
 764 somebody behind me - and I - I think it was Garrett - it - it might not
 765 have been - said, "Okay." Um, and she reached for it again and she

766 had her hand on the weapon. I - and I - I fired what I think is two shots
 767 and took kind of a slight pau- I mean I don't even know if you'd be able
 768 to tell if we had good audio if there was a pause but in my mind there's
 769 a pause. She reaches for it again and she's touching it and I fire one
 770 more time and at that point her body goes limp - I mean visibly limp.
 771 And we don't communicate. We didn't say anything. [REDACTED]

Officer Smith recalled the second series of shots taken by Officer Lindeman:

563 perceived her as a threat the entire time, um, Officer Lindeman ended
 564 up firing, um, just purely based off where she was in the stack. I had
 565 two officers in front of me, um, I wasn't comfortable firing off rounds
 566 with two of 'em in front of me. Um, so that's why she was the one in th-
 567 taking those shots. Um, she had the best line of sight from my vantage
 568 point to do that. Um, once those final shots go off, um, we move up as

After the second series of shots were fired, the officers in the react team began moving up towards where Ms. Jester lay in order to retrieve the weapon and began administering first aid. Already awakened by the initial series of shots, many of the apartment residents heard the second series of shots as well.

After the scene had been secured, SIU investigators canvassed the immediate area in which the shooting incident occurred. During this canvass, SIU investigators identified two residents who had made video recordings with their cellular telephones. Both residents provided their cellular telephones to SIU detectives so that they could download the video recordings. Neither of the recordings captured any of the events leading to or including the first series of shots fired, and only one of the video recordings captured any of the events relevant to the second series of shots fired.¹⁷ The recording corroborates the reports of Officer Lindeman, Officer Smith, and the other officers as to the facts and circumstances following the initial series of shots.

There is no additional video or audio footage of the incident. Because the officers' patrol vehicles were all parked some distance away from the scene of the shooting incident there are no DMAV recordings of the incident. Also, at the time, APD officers had not been assigned body cameras.

4. Retrieving the Gun, Administering First Aid and Custody

After the second series of shots, Corporal Shand approached Ms. Jester and kicked the weapon away from her.¹⁸ Officer Smith next radioed and requested a trauma kit from the next officer arriving. Officer Lindeman put on latex protective gloves, turned Ms. Jester over, and noticed a gunshot wound

¹⁷ One of the videos begins with the moments following the second series of shots and depicts APD officers administering first aid to Ms. Jester after the second series of shots. However, the other video recording captured audio only of the second series of shots due to the lighting conditions; the video portion of the recording does not capture any events related to the shooting incident that allow us to make any determinations about the facts and circumstances leading to the second series of shots fired.

¹⁸ Officer Lindeman did not learn until the following Monday that Ms. Jester's weapon was actually a Co2 air gun.

to what appeared to be her abdomen. Officer Arthurs placed pressure on her stomach. They noticed that she had several wounds, including a wound to the head and a wound to her right arm, which was bleeding heavily. At this time, the officers believed that Ms. Jester was still alive. The officers continued to administer first aid until EMS arrived.

II. SUMMARY OF POST-INCIDENT INVESTIGATION

A. Processing of the Scene and Recovery of Evidence

In evaluating the various statements by officers and civilian witnesses regarding the facts and circumstances of Ms. Jester's shooting, we also relied on evidence recovered and developed by APD's Crime Scene Unit. After the shooting scene was secured, APD crime scene specialists were dispatched to the shooting scene.¹⁹ Once briefed by on-scene SIU detectives, crime scene specialists identified, documented, photographed, and collected evidence recovered throughout the shooting scene.²⁰ Some of the items recovered by the crime scene specialists—fired cartridge cases, bullet/projectile fragments, and weapons—were subjected to further forensic analyses.

These results also helped us determine the facts and circumstances leading to Ms. Jester's shooting. They factored into our analysis and will be discussed later in this declination letter.²¹ Prosecutors and an investigator from our office were present as observers during the initial processing of the shooting scene.

1. Weapons Recovered from Immediate Area of Ms. Jester's Final Position

The location at which Ms. Jester fell after the first shooting sequence was also her final position after the second shooting sequence. Processing of this location yielded critical evidence that corroborated significant details concerning the facts and circumstances leading to her shooting. Crime scene processors documented and recovered two weapons from the area of Ms. Jester's final position—a single knife²² and a black air gun, commonly referred to as a "pellet gun."²³

¹⁹ The Austin Police Department's Crime Scene Section is responsible for the processing of all crime scenes. The Crime Scene Section maintains an ASCLD/LAB accredited laboratory.

²⁰ Once identified, Crime Scene Specialists photographed the evidence as it was discovered and then assigned a unique evidentiary "tag" number, and again photographing it, before they collected it. The photographs used in this decision letter are taken from these photographs.

²¹ See § III A (1) at p. 17.

²² The folding knife was in its folded position when recovered.

²³ The recovered air gun was identified as a 4.5 mm caliber, black XBG Umarex. Also recovered was a cellular telephone belonging to Ms. Jester which was lying north of the air gun and folding knife.

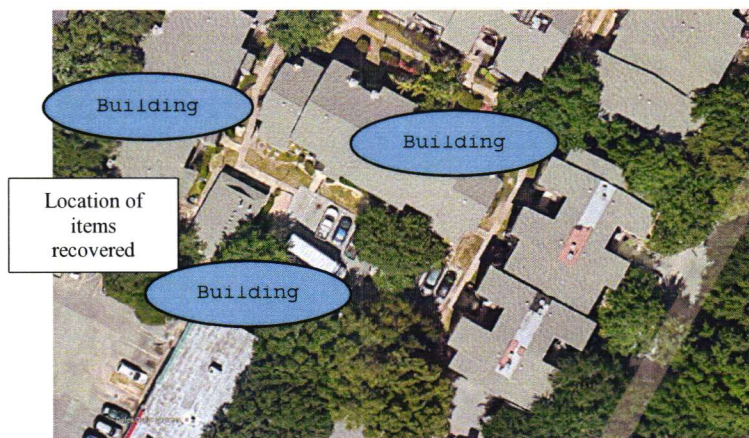


Figure 4--Location from which knife and air gun recovered near Ms. Jester's final position on sidewalk in front of building nineteen, the complex's parking lot. Building numbers are denoted.

The air gun was initially recovered and located in the outer edge of a shrub in the area just adjacent to the sidewalk where Ms. Jester fell, in front of building nineteen.



Figure 5—Items recovered from location of Ms. Jester's final position: an air gun and folding knife; medical intervention tool kit in foreground. Each of these items was recovered to the immediate right of Ms. Jester.



Figure 6—Air gun recovered from location Ms. Jester fell after initial shooting, in front of building nineteen. The air gun was initially located on the pavement within near Ms. Jester and was kicked into the shrubs adjacent to the sidewalk when officers approached her after the second shooting sequence.

In all pertinent respect, the air gun appears to have been manufactured to simulate an actual semiautomatic pistol. APD detectives identified the air pistol as a UBX Umarex 4.5 mm pistol capable of firing BB's, depicted below.



Figure 7--Manufacturer advertisement photograph of the UBX Umarex 4.5 mm pistol which Ms. Jester had at the time of her shooting.

Ms. Jester's air gun is not a "firearm" as that term is defined in Texas law.²⁴ The recovered air gun is remarkably similar and is intended to resemble a full-size firearm. There are no discernible characteristics on the air gun that would indicate it to be anything other than an operational firearm.²⁵ At the direction of SIU, crime scene specialists processed the recovered air gun for latent prints for comparison to Ms. Jester's known prints. The air gun was processed for prints on its front and back straps, grips, trigger and trigger guard, and other areas. However, no latent prints were obtained from the air gun.

2. Night Image Video Recording – Illumination and Visibility Analyses

Several days after the shooting incident, APD crime scene specialists returned to the apartment complex at approximately 4:00 a.m. in order to replicate and visually record the lighting conditions and visibility that likely existed at the time that Officers Smith and Lindeman encountered Ms. Jester. Most significantly, specialists noticed that several complex lights were not illuminated: a lamp post directly adjacent to Ms. Jester's final position, a light mounted above the entrance to the breezeway, a lamp at the end of the sidewalk in front of building fourteen, and a light mounted on the ceiling of the first floor stairwell out which Ms. Jester emerged when she encountered Officers Smith and Lindeman. Several lights were operable, which permitted Officer Smith and Officer Lindeman limited visibility of Ms. Jester, her approach towards them, and the fact that she was armed with what appeared to be a

²⁴ TEX. PEN. CODE § 46.01 (3) defines a "firearm" as "any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use." The fact that Ms. Jester's air gun is not a "firearm" does not necessarily mean that an air gun cannot be a deadly weapon under Texas law depending upon how it is used; a "deadly weapon" includes "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PEN. CODE § 1.07 (17).

²⁵ The manufacturer advertises the Umarex XBG as "a 19-shot drop-free metal magazine ... for quick reloading and is powered by a single 12g CO2 capsule. This lightweight, compact BB pistol has fixed front and rear sights and shoots in double action at 410 FPS." In all respects—dimensions, barrel length, total length, *etc.*—the Umarex resembles a fully operational firearm compact semiautomatic pistol. See Umarex air guns website at <https://www.umarexusa.com/products/umarex-xbg>.

pistol. The crime scene specialists' illumination analyses corresponds with the reports of all five officers involved of the lighting conditions that existed at the time of the shooting.

3. Collection of Biological Evidence from Officers Smith and Lindeman

Pursuant to standard policy in all officer-involved shootings, APD crime scene specialists also collected biological evidence from both officers directly involved in the shooting incident. The purpose of collecting DNA is to have it on hand in the event a piece of evidence needs to be DNA-tested. In this case, there were no such identity issues and no DNA analyses on the officers' biological samples were conducted.

4. Identification of Ms. Jester

Ms. Jester was formally identified by comparison of her known palm and fingerprints with those obtained by examiners during her autopsy and provided to crime scene specialists. As noted earlier, although the items recovered from the location of Ms. Jester's final position were processed for latent prints, no such prints were able to be obtained for comparison to her known palm and fingerprints.

5. Gunshot Residue Analysis

On the morning of the shooting, pursuant to standard policy, crime scene specialists processed Officer Lindeman's and Officer Smith's hands for gunshot residue.²⁶ After Ms. Jester was transported to the hospital for surgical intervention and subsequently pronounced deceased, crime scene specialists also processed Ms. Jester's hands for gunshot residue. Forensic analysis of the gunshot residue analyses from the officers and Ms. Jester was not subjected to further analyses because there were no investigative issues concerning who had fired a firearm: the officers' reports, the examination of their weapons and ammunition inventory, and recovered casings all indicate that only Officer Lindeman and Officer Smith discharged a firearm, while the report that Ms. Jester was in possession of an air gun obviated the need for any such analysis.

III. FORENSIC ANALYSES AND MEDICAL EXAMINATION

A. Firearms, Toolmark Identification, and Ballistics

1. Firearm-Related and Toolmark Forensic Analyses

The reconstruction of the facts and circumstances surrounding any shooting instance is based upon an evaluation of the reports by those directly involved, witnesses to the incident, and the examination and forensic analysis of any firearm- and shooting-related evidence collected. The firearm-related and

²⁶ "Gunshot residue analysis" is a forensic test used to identify whether a particular surface was or was not within a very limited range from a fired weapon. Generally the analysis is used to determine whether a particular person fired a weapon. Technically, the analysis seeks to determine the presence of common and known "materials [that are] expelled from the muzzle of a firearm during discharge and, at close range, will be deposited on nearly any surface." HAAG, M. AND HAAG, L., *Shooting Incident Reconstruction*, 2nd ed. (Academic Press 2011), 87. In short, the analysis seeks to determine the presence of certain particles known to be expelled from a muzzle at the time of a weapons' discharge on a person's arm or hands in an effort to determine whether he or she fired a weapon. *Id.* Gunshot residue is obtained by "lifting" any such residue from a surface by applying a sticky metal strip to the surface and analyzing the contents of the strip after it is lifted.

ballistics²⁷ evidence factored into our determination that Officer Lindeman's and Officer Smith's use of deadly force was not unreasonable.

In addition to taking custody of Officer Lindeman's and Officer Smith's duty weapons,²⁸ APD crime scene processors and SIU detectives documented and recovered a total of twelve fired cartridge cases.²⁹ Subsequent analyses performed on the recovered cartridge cases identified these fired cartridge cases as having been fired from APD Officer Smith's and Officer Lindeman's weapons. Of the recovered fired cartridge cases, the analyses indicated that seven were fired from Officer Lindeman's caliber 40 handgun and that the remaining five were fired from Officer Smith's caliber 9 mm handgun. The fired cartridge cases were recovered in two separate locations in the same general area within the complex: the first near the entryway to building thirteen, where officers initially engaged Ms. Jester, and the other in the front of building fourteen, near the laundry room where officers' final engagement with Ms. Jester occurred. Correlating the recovered cartridge cases with the duty weapons collected from Officer Lindeman and Officer Smith, we are able to determine the general locations of Officer Smith and Officer Lindeman at the time of the discharge of their weapons in both shooting sequences:

Cartridge Cases Recovered			
	Location 1 in front of Building 13	Location 2 in front of Building 14 and Laundry Room	Total fired cartridge cases recovered
caliber 9 mm (Officer Smith)	5	0	5
caliber .40 (Officer Lindeman)	4	3	7

The two shooting positions also correspond to the paths that Officers Smith and Lindeman described taking in their approach through their final shooting positions. *See* Fig. 8, below.

²⁷ "Ballistics" refers to the "science and study of projectiles in motion usually divided into three parts: (1) interior, which studies the projectiles movement inside the gun; (2) exterior, which studies the projectile's movements between the muzzle and the target; and (3) terminal, which studies the projectile's movement and behavior in the target." HAAG AND HAAG, *Shooting Incident Reconstruction*, 87. Ballistics depends upon an analysis and comparison of known projectiles, casings, and firearms to determine possible sources.

²⁸ Pursuant to APD policy, an APD Firearm & Toolmark Examiner collected both Smith's and Lindeman's duty weapons at the scene for standard processing after an officer-involved shooting; one (1) caliber 9mm semiautomatic pistol was collected from Officer Smith, and one (1) caliber .40 semiautomatic pistol was collected from Officer Lindeman. Ms. Jester's air gun is not a deadly weapon *per se*. *See Mosley v. State*, 545 S.W.2d 144 (Tex. Crim. App. 1976) (simply pointing an unloaded air pistol at another does not constitute the use of a deadly weapon). However, Texas law provides that a "deadly weapon" can be "anything that in the manner of its use or intended use is capable of causing death or serious bodily injury." TEX. PEN. CODE § 1.07 (17) (B). As a consequence, an air pistol used in a manner that might threaten death or serious bodily injury can be a deadly weapon. *See In re R.G.*, 2002 Tex. App. LEXIS 8541 (Tex. App.—Austin [3rd Dist.] 2002, *no pet.*)(unpublished)(evidence was sufficient to support finding that pellet gun was a "deadly weapon" where facts showed that defendant shot victim with pellet gun at close range and expert testimony established that the pellets used were capable of causing the loss of an eye).

²⁹ An additional 9 mm fired cartridge case was recovered but was determined not to have been associated with this incident.

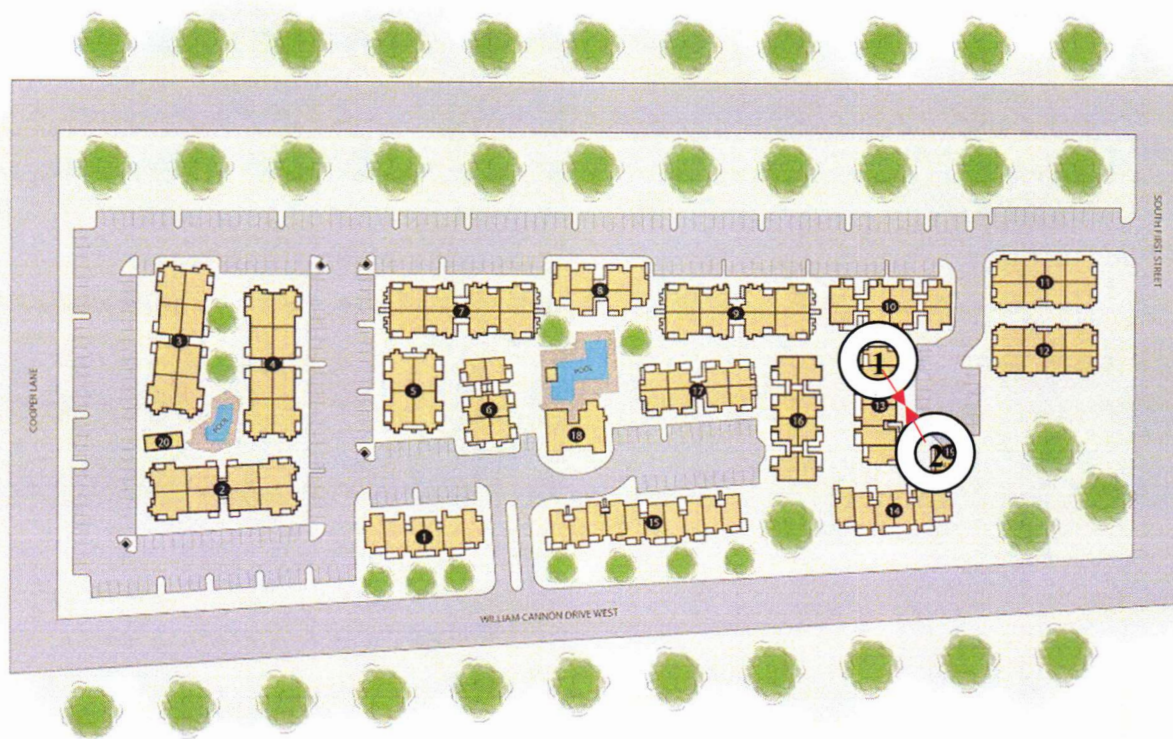


Figure 8--Locations of Officers Smith and Lindeman's shooting positions in shooting sequence 1 and 2, with the directions at which the officers discharged their weapons in each sequence.

The locations from which the cartridge cases were recovered are consistent with Officer Lindeman's and Officer Smith's reported shooting positions.³⁰ The following diagram indicates the specific locations at which the key firearm discharge related evidence was recovered. It corresponds with both Officers Smith and Lindeman's reported shooting positions at each shooting sequence, indicated below, and the directions they traveled.³¹

³⁰ APD Firearms and Toolmark Examiners determined that the locations of the recovered cartridge case locations were consistent with the typical ejection pattern of both officers' manufacturer pistols. Under appropriate conditions, cartridge case locations "provide useful information as to the probable shooter position(s)" depending upon several variables including weapon design and condition. HUESKE, E., *Practical Analysis and Reconstruction of Shooting Incidents*, 2nd ed., 156 (CRC Press 2016).

³¹ See Appendix for key to evidentiary items depicted in the figure.

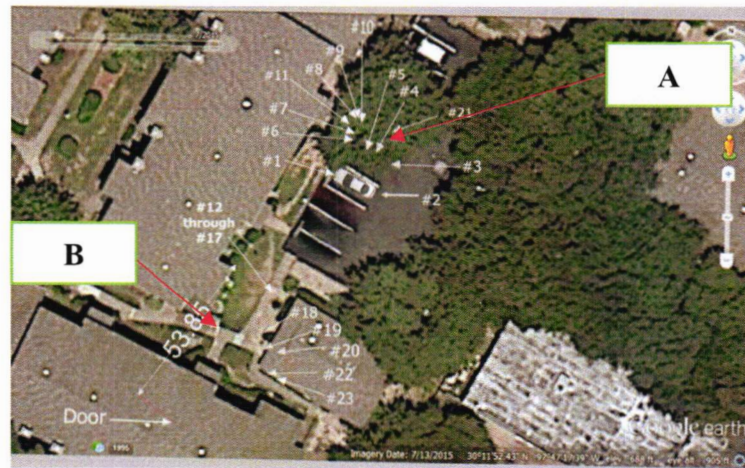


Figure 9--Location of recovered evidence related to discharge of firearms and indicating locations of separate shooting sequences as "A" and "B." See Appendix for key to evidentiary items depicted above.

In addition to recovering fired cartridge cases, crime scene processors also recovered bullets and bullet fragments. Specifically, eleven bullets or fragments were recovered from the shooting scene³² and an additional two bullet fragments were recovered during Ms. Jester's medical examination, for a total of thirteen recovered fragments or projectiles.

Bullets and/or Fragments Recovered				
Location 1 in front of Building 13	Location 2 in front of Building 14 and Laundry Room	Apartment Building / Structure / Vehicles	Autopsy / Medical Examination	Total projectiles / bullets recovered
4	2	5	2 ³³	13

Pursuant to standard practice, after the shooting scene was cleared, an APD Firearms and Toolmark Examiner examined Officers Smith's and Lindeman's duty weapons for functionality and operability and determined that both weapons were determined to have been operating normally at the time of the shooting. In addition, in order to determine the number of rounds fired from each weapon, the firearms examiner follows a process of inventorying the number of unfired rounds an officer began his or her shift with compared to the total number of unfired rounds in his or her possession after the shooting.³⁴ Here, Officer Lindeman reported that she started her shift with a total of thirty live rounds; a post-shooting inventory indicated that she had a total of twenty-two live rounds remaining in her ammunition magazines with one live round in the chamber indicating a total of seven shots fired from her duty weapon, which is consistent with the number of recovered fired cartridges associated with her weapon.³⁵ Officer Smith reported that he started his shift based on practices with a total of fifty-two

³² Two projectiles were located away from the immediate shooting scene: one was located inside apartment 1095 and the other near building # 13.

³³ See discussion of post-mortem medical examination at § III B, p. 25, below.

³⁴ In the context of a semiautomatic pistol, the inventory counts the number of unfired rounds in the weapon's chamber and its magazine (and extra magazines) prior to the shooting incident and compares this with the number of unfired rounds in the weapon and magazine following the shooting incident.

³⁵ Officer Smith reported that he normally begins his shift with three (3) seventeen round capacity magazines for a total of fifty-one live rounds but loads an additional round in the chamber which yields a total of fifty two live rounds; Officer

live rounds; a post-shooting inventory and inspection of Officer Smith's duty weapon, magazine, and additional ammunition in additional magazines indicated a total of forty-seven remaining live rounds indicating a total of five shots fired from Officer Smith's duty weapon, which is consistent with the number of recovered fired cartridges associated with his weapon.³⁶ Both officer's reports of how many shots they believed they fired is fairly consistent with the post-shooting inspections. More importantly, the cartridge cases recovered nearly completely correspond to the post-shooting inspection of shots discharged from each weapon assuming that the pistols were loaded in the manner each officer reported.

After reviewing the firearms-related evidence recovered at the shooting scene, along with the post-shooting inspection of each officers' duty weapon, we conclude that the evidence is consistent with the reports of Officers Smith and Lindeman, other officers at the shooting scene, and civilian witnesses concerning both officers' shooting positions in the first and second series of shots.³⁷

2. Ballistics, Trajectory Analyses, and Structural Defects

Crime scene processors identified and documented structural defects caused by the shooting to both the complex and cars parked in the complex parking lot at the time of the shooting. Each of the defects are consistent with the shooting positions that Officer Lindeman and Officer Smith reported for the initial shooting sequence.



Figure 10--Damage to front door of apartment 1095 located in Building 14 adjacent to Officer Lindeman's and Officer Smith's shooting positions.

Lindeman reported that she normally begins her shift with two (2) fifteen capacity round magazines with no additional round loaded in the chamber which yields a total of thirty live rounds.

³⁶ The process involves the test firing of the collected duty weapons for operability and functioning and an examination of each weapon's chamber for live rounds, and an inventory of the pistol's magazine and any additional magazine the officer carried on his or her duty belt. Here, both duty weapons were operational and had not unauthorized modifications. Each were outfitted with a tactical light.

³⁷ It is not uncommon for an officer's post-shooting report of how many shots they fired to be slightly below or greater than the actual number of shots fired when the actual inventory is compared. Here, Officer Smith reported that he believed he fired a total of three to four shots without reloading while Officer Lindeman reported that she believed she fired a total of eight shots without reloading, five in the first sequence of shots and three in the second sequence of shots.



Figure 11--Damage to front door of apartment 1096 located in building 14 adjacent to Officer Lindeman's and Officer Smith's shooting positions.



Figure 12--Damage to top of vehicle in parking lot from behind which Officer Lindeman and Officer Smith fired their duty weapons.

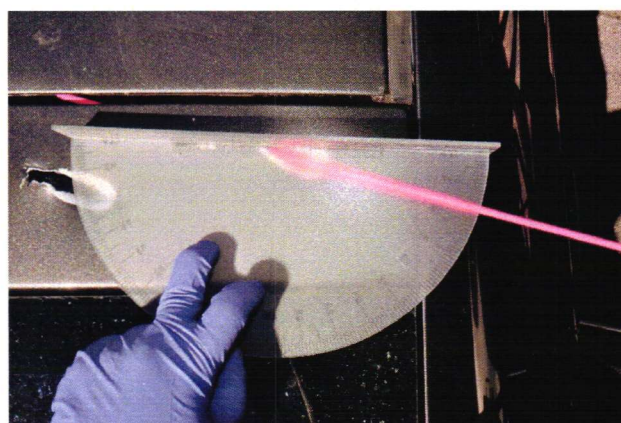


Figure 13--Use of a zero edge protractor to determine azimuth angle of shot that damaged vehicle indicating shooter's position as towards left of vehicle and firing from left to right.



Figure 14--General view of relative shooting position from perspective of Officers Smith and Lindeman in initial shooting sequence.

B. Post-Mortem Medical Examination

On October 17, 2016, the Travis County Medical Examiner conducted a postmortem examination (autopsy) on Ms. Jester. The examiner ruled homicide as her manner of death and gunshot wounds as her cause of death.³⁸ As required by law, the medical examiner issued a death investigation report.³⁹ The medical examiner identified a total of eight gunshot-related wounds to Ms. Jester, connected to her having been shot a total of five times. The medical examiner noted that Ms. Jester sustained:

- One penetrating gunshot wound⁴⁰ of the right side of the head;
- One grazing gunshot wound⁴¹ on the right side of the head; and
- Three perforating gunshot wounds (right arm, right upper chest, right upper abdomen) with three corresponding exit wounds.

The perforating gunshot wounds were to her upper right arm, upper right chest, and abdomen. During the postmortem examination, three items of evidentiary value related to the shooting incident were recovered including one bullet, one fragment of jacket and lead, and one small fragment of jacket.

The medical examiner determined that nearly all of Ms. Jester's penetrating and perforating gunshot wounds, with the exception of one, followed a path of travel that was front-to-back. The remaining gunshot wound followed a right-to-left path of travel. While not necessarily indicative of actual shooting positions, only one of the perforating wounds was "slightly" front to back, indicating it may have been the initial gunshot wound from the first shooting sequence. Equally important is the observation that each of the perforating/penetrating gunshot wounds was oriented downwards. The orientation of these wound paths is consistent with Ms. Jester lying on the ground with the shooting position being above where her head was laying. The medical examiner could not make a determination of relative range of fire distance from examination of the wounds.

³⁸ "Cause of death" refers to the condition that produced the victim's death while "manner of death" is an interpretive opinion that explains how the cause of death was caused. "Homicide" is one of several manners of death which include accident, suicide, or natural causes. "Homicide" is not a legal denotation as to whether the act leading to the death is or is not criminal.

³⁹ Travis County Office of the Medical Examiner's Office, Medical Examiner Report No. 16-04512.

⁴⁰ A "penetrating" wound is one that enters but does not exit the body.

⁴¹ A "perforating" gunshot wound is one that enters and exits the body. A single perforating gunshot can have multiple entry and exit points depending upon the trajectory of the bullet and the subject's body position when struck.

With respect to the single wound to Ms. Jester's abdomen, it is the only wound with a trajectory of any degree of front to back and is the only wound with an orientation that was slightly upwards which is consistent with the initial shooting sequence in which the officers were facing Ms. Jester as she emerged from building fourteen somewhat elevated because of the elevation of the sidewalk on which she was approaching them.



Figure 15--Photograph depicting slight elevation of sidewalk leading from building 14 relative to Officers Smith and Lindeman's shooting positions in shooting sequence 1.

In addition to the shooting-related injuries, the examining physician also noted evidence of surgical intervention as well as the first aid administered prior to the arrival of EMS. Finally, the medical examiner's toxicology testing on Ms. Jester's postmortem blood did not demonstrate the presence of drugs or medications. For each of the wounds, the medical examiner did not notice soot, stippling, tissue searing, or muzzle imprint, each of which can be correlated with either a contact, close, or intermediate range of fire.

Evidence recovered at the scene and the medical examination corroborate the officers' reports concerning the circumstances leading to and immediately following Ms. Jester's shooting.

IV. LEGAL ANALYSIS: REASONABLENESS OF OFFICER LINDEMAN'S AND OFFICER SMITH'S USE OF DEADLY FORCE

The use of deadly force without legal justification would constitute a criminal offense for which prosecution is warranted. In the case of an officer's use of deadly force, to constitute a prosecutable offense would require us to conclude that there are no legal justifications applicable to the credible investigative facts. Here, whether or not the officers' use of deadly force reasonable depended on whether the investigative facts support the conclusion that a reasonable juror would determine that their use of such force was justified in self-defense, defense of a third person, and/or to effectuate a legitimate law enforcement purpose. For the reasons outlined below, we conclude that a reasonable juror following the law would find the use of force to be justified.

A. Law Governing Use of Deadly Force

The Fourth Amendment and Texas statutory law govern our analysis of the reasonableness of Officer Lindeman's and Officer Smith's use of deadly force in Ms. Jester's shooting death. Under the Fourth Amendment, a law enforcement officer's shooting of a person constitutes a "seizure" and, as a consequence, is subject to the amendment's requirement that it be reasonable⁴² as that term has been construed by the United States Supreme Court.⁴³ The Supreme Court has directed that the inquiry is essentially one of objective reasonableness: the question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."⁴⁴

In conducting our analysis, we are to evaluate the officer's use of force based on the facts and circumstances then existing on the scene and determine "judged from the perspective of a reasonable officer on the scene," whether a reasonable officer would have used deadly force based on the facts and circumstances viewed from the perspective of the acting officer at the time the force was used.⁴⁵ This inquiry must make "allowance for the fact that police officers are often forced to make split-second judgments" and should not be based on the benefit of "the 20/20 vision of hindsight."⁴⁶ In the context of the law enforcement use of deadly force, the basic requirement is that the use of deadly force be limited to situations in which it was immediately necessary.⁴⁷

Texas law incorporates the Fourth Amendment's reasonableness standard in several statutes applicable to the facts and circumstances of Ms. Jester's shooting. Those statutes allow the use of deadly force in self-defense, in defense of third persons, and in order to effectuate a legitimate law enforcement purpose.⁴⁸

B. Texas Law Governing the Use of Deadly Force: Chapter 9 and the Reasonableness Standard

Chapter 9 of the Texas Penal Code provides three basic circumstances under which a law enforcement officer's use of deadly force is justified: in self-defense, in defense of a third person, or to effectuate a legitimate law enforcement purpose such as an arrest or search. We must evaluate the reasonableness of each officer's use of force for each shooting sequence.

1. Use of Deadly Force in Self-Defense: Texas Penal Code § 9.32

Section 9.32 of the Texas Penal Code describes the circumstances under which deadly force may be used in self-defense by any person, law enforcement or not. It states:

- (a) A person is justified in using deadly force against another:
 - (1) if the actor would be justified in using force against the other...; and

⁴² "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..." U.S. CONST. AMEND. IV.

⁴³ U.S. CONST. AMEND. IV.

⁴⁴ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁴⁵ *Id.* at 396-97.

⁴⁶ Our inquiry must consider whether a reasonable officer in the circumstances that Officer Lindeman and Officer Smith encountered would have reasonably concluded that Ms. Jester was pointing a firearm at them instead of an air pistol when she first confronted them.

⁴⁷ *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985).

⁴⁸ TEX. PEN. CODE §§ 9.32, 9.33, and 9.51 (c).

- (2) when and to the degree the actor reasonably believes the deadly force is immediately necessary:
 - 1. to protect the actor against the other's use or attempted use of unlawful deadly force; or
 - 2. to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.

Section 9.32 expressly predicates the authority to use deadly force on the condition that the actor first have been authorized to use non-deadly force under Section 9.31, which governs the use of non-deadly force. That section, which sets forth the basic reasonableness standard discussed earlier, provides that:

- (a) ... [A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force.

Only if the actor first satisfies Section 9.32's requirements controlling the use of deadly force can he or she be justified in the use of deadly force.

2. Use of Deadly Force in Defense of a Third Person: Texas Penal Code § 9.33

The use of deadly force to protect a third person calls for what might be best described as a surrogate analysis: the use of deadly force in defense of a third person is authorized if only if the actor is justified in the use of deadly force to defend him- or herself. As with Section 9.32, this justification is applicable to all persons, whether law enforcement or not. That section provides:

- (a) A person is justified in using force or deadly force against another to protect a third person if:
 - (1) under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect.

3. Use of Deadly Force to Effectuate a Legitimate Law Enforcement Purpose: Texas Penal Code 9.51

The final justification applicable to the facts established here is found in Section 9.51, which governs all uses of force by a law enforcement officer while in the discharge of his or her duties. It is applicable only to law enforcement officers' use of force. Section 9.51 provides:

- (a) A peace officer...is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to make or assist in making an arrest..., if:
 - (1) the actor reasonably believes the arrest or search is lawful...; and
 - (2) before using force, the actor manifests his purpose to arrest or search and identifies himself as a peace officer or as one acting at a peace officer's direction, unless he reasonably believes his purpose and identity are already known or cannot be reasonably made known to the person to be arrested.

C. Analysis: The Facts and Circumstances of Officer Lindeman's and Officer Smith's Use of Deadly Force

We view the incident in which Ms. Jester was killed as a single incident involving two series of shots fired. The initial shooting happened when Officer Lindeman and Officer Smith encountered Ms. Jester in front of building thirteen, and a second shooting sequence (in which only Officer Lindeman fired a gun) that occurred in front of building nineteen.

Each of the officers' conduct in discharging their weapons⁴⁹ in both series of shots must be evaluated in terms of its reasonableness under the above-cited statutes. We have concluded that on the credible facts established here, both Officer Lindeman and Officer Smith's use of deadly force in Ms. Jester's shooting was not unreasonable under the applicable statutes.

1. Shooting Incident No. 1: Officers Encounter Ms. Jester in Front of Building 13

a. Officer Lindeman's and Officer Smith's Use of Deadly Force⁵⁰

The facts and circumstances known to Officer Lindeman at the time she initially discharged her duty weapon must be considered.

The investigation established that Officer Lindeman was the first officer to arrive at the apartment complex. Prior to her arrival, Officer Lindeman had listened to the radio traffic and was aware of the information provided by the dispatcher which kept her updated on the status of the 911 call. In summary, Officer Lindeman was aware that:

- The initial 911 call involved a possible domestic disturbance and/or welfare check involving a child;
- The 911 caller was having difficulty communicating the circumstances to the dispatcher⁵¹; and
- The caller mentioned a gun, although the gun's involvement in the call was not clear.

Once Officer Smith met up with Officer Lindeman, the two officers approached building fourteen, where the 911 caller's apartment was located. As they walked up to the building, however, the gun's involvement in the 911 call took on primary significance. Officer Lindeman recalled that as she was walking towards the apartment that "[d]ispatch in my mind says something to the effect of, 'The gun is in her hand.'" Officer Lindeman recalled that this caught her attention because prior to the update,

⁴⁹ Even if the officers' shots had not struck Ms. Jester, the discharge of their weapons in her direction alone constitutes a use of deadly force and is otherwise a criminal offense if not statutorily justified. "The threat of force is justified when the use of force is justified. For purposes of this section, a threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force. TEX. PEN. CODE § 9.04. Here, it is evident that both officers discharged their weapons and as such there was an actual use of force. *See e.g.*, TEX. PEN. CODE § 22.02 Aggravated Assault (use of a deadly weapon during the course of an assault). An "assault" occurs whenever a person "intentionally or knowingly threatens another with imminent bodily injury..." TEX. PEN. CODE § 22.01. As a use of deadly force, the discharge of a weapon is a threat to use deadly force which is justified only if reasonableness requirements as contemplated by the various justifications for use of deadly force contained chapter 9 of the Penal Code.

⁵⁰ Because both Officer Lindeman and Officer Smith were together when they first encountered Ms. Jester emerging from building fourteen's breezeway armed with what they believed was a handgun, the facts and circumstances of which both were aware are largely the same. Consequently, we will discuss those facts and circumstances together. We will note any differences in what either officer was aware of prior to and at the time either discharged his or her weapon where necessary.

⁵¹ During her SIU interview, Officer Lindeman recalled that "...for some reason in my mind we were not getting to ask direct questions." *See* Lindeman, SIU Intvw. (LI. 564-65).

Officer Lindeman "still felt like [Ms. Jester] was holding the baby too because that was, like the last thing that I'd heard that she was doing."⁵²

Officer Lindeman recalled her thoughts at the time she and Officer Smith approached the building: "And at that moment in my mind I registered that the gun is in play and that this suicidal female has the weapon. That's how I felt." Officer Lindeman suggested to Officer Smith that they "should get our guns out." However, almost simultaneously, Officer Lindeman and Officer Smith saw Ms. Jester emerge from building fourteen's breezeway. Ms. Jester, according to Officer Lindeman, appeared suddenly and was moving towards them rapidly, pointing a gun—

1400 A: ...so I kinda had an idea. Um, I guess I didn't realize it - it felt like, ya
 1401 know, she was holding that position and her hands were out and the
 1402 gun was pointed out but I guess I didn't realize how much she was
 1403 able ta - ta move forward. That part of it I didn't conceptualize in the
 1404 moment. Does that make sense?
 1405
 1406 Q1: Mm-hm.
 1407
 1408 A: Um, and then looki- ya know, I don't - I don't know if you can tell me or
 1409 not, like, I feel like she ended - I - I f- I feel like we were somewhere in
 1410 here. I mean, I could be wrong. I - I just kinda remember lookin' up and
 1411 seeing that laundromat. But - so it seems like she probably covered a
 1412 fair amount of ground but no, I couldn't tell you how many steps I
 1413 thought she took. For some reason, it - there's just her pointing the gun
 1414 at me...
 1415
 1416 Q: Mm-hm.
 1417
 1418 A: ...and the mov- and it was - whatever she was doing, it seems like it
 1419 was a straight movement. It wasn't anything from side to side or any
 1420 altering, it just seemed like it was...
 1421
 1422 Q: Okay.
 1423
 1424 A: ...direct.

Officer Lindeman recalled seeing Ms. Jester's approach clearly and distinctly:

625 ... - you know, the whole apartment complex is dark except that
 626 breezeway is lighted. And the way that I kind of envision it in my mind
 627 is like, you know, she was just walking out of this light. Like, I could see
 628 her - no problem. And her - and from the moment that - that I
 629 registered seeing her - looking up and seeing her - her arms were out
 630 and I can see that gun in her hands and she was walking towards us.

Officer Lindeman also noted how deliberate Ms. Jester's approach towards she and Officer Smith was:

⁵² Lindeman SIU interview at LI. 616-18.

631 Um, and, you know, I - I don't even remember saying, you know,
 632 "She's got a gun. She's got a gun." I don't remember that. I remember
 633 Garrett giving commands. Um, and then she was no- I mean she never
 634 wavered I guess is the strange thing. Even thinking back on it that she
 635 never went off course. She never dipped the gun. I mean that gun
 636 stayed out in her firing stance just like if you're at the firing line. ...

It was only after Ms. Jester emerged from the breezeway armed, pointing what they believed was a handgun, and quickly advancing towards Officer Lindeman and Officer Smith's position, that they discharged their weapons. The investigation indicates that Ms. Jester was within 20-25 feet of Officer Lindeman and Officer Smith's position when they both discharged their weapons. We conclude that under these circumstances, both Officer Lindeman and Officer Smith were justified in using deadly force in discharging their duty weapons at Ms. Jester. We believe that both officers were justified in doing so on the grounds of: (1) defense of self under § 9.32; (2) defense of third persons under § 9.33; and (3) in order to effect an arrest for an offense under § 9.51.

b. Officer Lindeman's and Officer Smith's Use of Deadly Force in Self-Defense—Tex. Pen. Code § 9.32

We conclude that the investigative facts establish that the facts and circumstances of which Officer Lindeman and Officer Smith were aware when they discharged their weapons are sufficient to satisfy the provisions of Section 9.31, thus allowing them to use non-deadly force to defend themselves as a prerequisite to their use of deadly force.⁵³ Both officers were faced with circumstances in which the danger to them was evident and imminent: they were responding to a possible domestic disturbance which they reasonably believed involved an armed subject. Upon their arrival, Ms. Jester suddenly emerged pointing a weapon and screaming at them, and moving at a rapid pace towards their position. Under these circumstances, it is not difficult to conclude that both officers, "reasonably believe[d] [that] the [use of] force is immediately necessary to protect [themselves] against the other's use or attempted use of unlawful force."⁵⁴ There are no facts or circumstances under which Ms. Jester's pointing of an apparent handgun at the approaching Officers Lindeman and Smith would render her actions a lawful threat of use of force. For these same reasons and under these circumstances, the provisions of Section 9.32 authorizing Officer Lindeman's and Officer Smith's use of deadly force in discharging their weapons at Ms. Jester in the initial series of shots are unquestionably established.⁵⁵

It is a fact that Ms. Jester, as was later determined, was not in possession of an actual "firearm"⁵⁶ as that term is defined under Texas law, but rather was in possession of an air gun, and commonly

⁵³ Under the circumstances then existing and with which both officers were confronted, both Officer Lindeman's and Officer Smith's belief that the use of deadly force was immediately necessary is *presumptively* reasonable under Texas Penal Code § 9.32. Specifically, subsection (b) of section 9.32 provides that "[t]he actor's belief...that the deadly force was immediately necessary...is presumed to be reasonable if the actor...knew or had reason to believe that the person against whom the force was used...was committing or attempting to commit" murder.

⁵⁴ TEX. PEN. CODE § 9.31 (a).

⁵⁵ Here, all of the non-exhaustive list of factors the Supreme Court noted in *Tennessee v. Garner*, the leading case on governing the reasonableness inquiry into a law enforcement officer's use of deadly force are present: the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Tennessee v. Garner*, 471 U.S. at 10-12. Ms. Jester's conduct involved the reasonably apparent danger of her commission of a violent felony while armed after evincing an intent to engage officers violently rather than submitting to an arrest.

⁵⁶ At least for chapter 10 offenses in the Texas Penal Code, a "firearm" is "any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use." TEX. PEN. CODE § 46.01 (3). Coincidentally, if a device is not a firearm, it cannot be a "handgun"

referred to as a “BB gun” or pellet gun.⁵⁷ Under governing law, the reasonableness of the use of force is determined by the circumstances existing at the time the force was used *as a reasonable person in the same circumstances would have perceived them*.

Here, the investigation revealed that there was no actual danger of Officer Lindeman or Officer Smith being shot with a firearm, although this was the operative “circumstance” under which they both discharged their weapons. However, both officers reasonably concluded that such a danger existed. Under these circumstances, we conclude that Officer Lindeman and Officer Smith both reasonably believed that their respective use of deadly force was immediately necessary to protect themselves against Ms. Jester’s apparent use or attempted use of unlawful deadly force or to prevent what they reasonably concluded was the imminent commission of murder if they did not discharge their weapons at her, and that a reasonable jury following the law would also so conclude.

c. Officer Lindeman’s and Officer Smith’s Use of Deadly Force in Defense of Third Persons—Tex. Pen. Code § 9.33

For the reasons that justified Officer Lindeman and Officer Smith in their use of deadly force in self-defense, we conclude that both officers were also justified in using deadly force to protect one another. Additionally, because this incident occurred in the early morning hours of October 15, it was also reasonable to assume that the apartment complex’s occupants were inside of their apartments and within Ms. Jester’s apparent line of fire. Under these circumstances, Officer Lindeman and Officer Smith reasonably believed that their use of deadly force was immediately necessary to terminate the apparent danger to protect the complex’s occupants.

As noted earlier, Texas Penal Code § 9.33 regulates the use of force in defense of a third person. That section provides that “[a] person is justified in using force or deadly force against another to protect a third person if...under the circumstances as the actor reasonably believes them to be, the actor would be justified under Section 9.31 or 9.32 in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect...and...the actor reasonably believes that his intervention is immediately necessary to protect the third person.” Having concluded that Officer Lindeman and Officer Smith were justified in their use of deadly force in order to prevent Ms. Jester’s apparent use or threatened use of deadly force against them in self-defense, we further conclude that both officers’ use of deadly force was also justified in order to defend one another, as well as the apartment complex’s occupants from the same apparent danger that they reasonably believed threatened them each, and that a reasonable jury following the law would also so conclude.

d. Use of Deadly Force to Effectuate Ms. Jester’s Warrantless Arrest—Tex. Pen. Code § 9.51

Finally, for the reasons that justified Officer Lindeman’s and Officer Smith’s use of deadly force to defend themselves, one another, and the apartment complex’s occupants, it is also reasonable for the officers to have concluded that Ms. Jester was then engaged in the commission, imminent commission, and attempted commission of several violent criminal offenses. Under Texas law, a peace officer is

either. TEX. PEN. CODE § 46.01 (5). See e.g., *Holloman v. State*, No. 07-13-00173-CR, 2014 Tex. App. LEXIS 12950, at *6-7 (Tex. App.—Amarillo Dec. 3, pet. ref’d) (*mem. op., not designated for publication*)(a BB gun is not a “firearm” for purposes of chapter 10 offenses).

⁵⁷ Based on the appearance, features, and dimensions of the gun Ms. Jester was pointing at Officers Lindeman and Smith, the air gun was manufactured to appear as an actual firearm.

authorized to arrest any person for any offense committed within his or her presence or view without a warrant.⁵⁸

Based on their observations, Officer Lindeman and Officer Smith had probable cause to believe, and were authorized to make Ms. Jester's warrantless for, at a minimum, for several offenses committed within their presence or view including Unlawfully Carrying a Weapon,⁵⁹ Deadly Conduct,⁶⁰ and Assault on a Public Servant.⁶¹ The facts and circumstances of which Officer Lindeman and Officer Smith were aware at the time they discharged their weapons would have also satisfied the probable cause standard that would have allowed them to have taken her into custody and placed her under formal arrest: Ms. Jester was armed with an apparent handgun, and advanced towards the officers' positions pointing it at them and refusing directions to put the weapon down. Specifically, we conclude that both officers formed the reasonable belief that their use of deadly force was "immediately necessary to make or assist in making" Ms. Jester's arrest. Under these circumstances, it was reasonable for both officers to believe that their warrantless arrest of Ms. Jester was lawful.⁶²

For the reasons that warranted Ms. Jester's warrantless arrest, the facts and circumstances then existing also warranted Officer Lindeman's and Officer Smith's belief that the use of deadly force to make her arrest her was immediately necessary was reasonable because the also reasonably concluded that Ms. Jester posed a "substantial risk" that she "would cause death or serious bodily injury" to the officers if they attempted to arrest or detain her. Under these circumstances, we conclude that Officer Lindeman's and Officer Smith's use of deadly force to effect Ms. Jester's arrest was justified under Texas Penal Code § 9.51 (a).

For these reasons, Officer Lindeman's and Officer Smith's use of deadly force in the initial shooting sequence was an objectively reasonable use of deadly force under Texas law, and a reasonable jury following the law would so conclude.

2. Shooting Incident #2 in front of Laundry Room and Building 14

Approximately 3 minutes after the initial series of shots, Officer Lindeman discharged her duty weapon for a second time, firing three shots at Ms. Jester. Officer Smith did not discharge his weapon during this series of shots.

Based on the credible facts established here, we conclude that Officer Lindeman's use of deadly force was justified by her objectively reasonable belief that the use of such force was immediately necessary to protect herself, her fellow officers and the apartment's occupants, and to effectuate Ms. Jester's arrest.

As indicated by the credible facts established here, Ms. Jester was struck in the initial series of Officer Lindeman's and Officer Smith's shots and fell on the sidewalk leading from building fourteen in front of the complex's laundry mat. Ms. Jester was still alive after this initial series of shots. After Ms. Jester fell, Officer Lindeman was initially unable to see her. Officer Lindeman and Officer Smith moved

⁵⁸ TEX. CODE CRIM. PROC. art. 14.01.

⁵⁹ TEX. PEN. CODE § 46.02.

⁶⁰ TEX. PEN. CODE § 22.05.

⁶¹ TEX. PEN. CODE § 22.01 (b) (1).

⁶² There is no need to consider section 9.51 (a)'s third requirement because Officer Lindeman and Officer Smith's identity were reasonably known to Ms. Jester under the circumstances; both officers were in full uniform and Ms. Jester was aware that officers had been called to the caller's apartment.

west using building fourteen for cover towards the location where they believed Ms. Jester had fallen. Officer Lindeman saw that Ms. Jester was lying on the sidewalk with her left hand above her head, but she was unable to see Ms. Jester's right hand. At this point, Officer Lindeman still could not see what she believed was Ms. Jester's gun. Officer Lindeman and Officer Smith then began to give directions to Ms. Jester to show her hands, but Ms. Jester did not comply with their requests. As Officers Lindeman and Smith moved closer towards Ms. Jester, Officer Lindeman turned her tactical light on and was able to see the weapon "by her right hand." Officer Lindeman noticed that Ms. Jester was trying to move as she continued to "say something to the effect of, 'Just shoot me.'" Officer Lindeman stated that they continued to issue commands to Ms. Jester but that she continued to move and would not get her right hand away from the gun.

Critical is Officer Lindeman's recollection of the events leading to the second shooting incident that she reported when interviewed: "And [Ms. Jester] reaches out and she touches the weapon but she doesn't—she's not able to get it in her hand or she doesn't put it in her hand at that point." Officer Lindeman decided that the officers could not approach Ms. Jester while she continued to reach for the weapon. Officer Lindeman reported saying to her fellow officers present that if Ms. Jester touched the gun again that she was going to shoot. The officers continued to order Ms. Jester to refrain from touching the weapon and to show her hands, but Ms. Jester did not comply with these directives. Officer Lindeman recalled that Ms. Jester touched her weapon again and it was only at that point that Officer Lindeman discharged her weapon for a second time, firing three shots at Ms. Jester.

Under these facts and circumstances, we conclude that Officer Lindeman's use of deadly force in discharging her weapon for a second time and striking Ms. Jester was an objectively reasonable use of deadly force under the statute governing the use of deadly force in self-defense, in defense of third persons, and to effect a lawful warrantless arrest, and that the use of deadly force was justified.

a. Officer Lindeman's Use of Deadly Force in Self-Defense—Tex. Pen. Code § 9.32

Officer Lindeman reasonably concluded that her use of deadly force was immediately necessary to prevent Ms. Jester's gaining control over the weapon that she had touched twice in contravention of the officers' directives that she not do so. Officer Lindeman's use of deadly force meets the standard set forth in Section 9.32 governing the use of self-defense, and a reasonable jury following the law would also so conclude.⁶³

b. Officer Lindeman's Use of Deadly Force in Defense of Third Persons—Tex. Pen. Code § 9.33

If the circumstances existing at the time of the use of deadly force would have been justified had the actor been in a third person's position, the actor is permitted to use such force in defense of that third person.⁶⁴ Here, Officer Lindeman had already formed a tactical team to approach the location where Ms. Jester was lying in order to arrest her, secure medical attention, and secure the weapon she had been holding. The approach team was "stacked" in such a way that the officers were side by side, one behind the other. Officer Lindeman reasonably believed that the other officers were at risk. In addition, the other occupants of the apartment building were reasonably believed to be in danger. Officer Lindeman was justified in discharging of her weapon for a second time to protect these occupants. We conclude that Officer Lindeman's use of deadly force meets the standard set forth in Section 9.33

⁶³ TEX. PEN. CODE § 9.32.

⁶⁴ TEX. PEN. CODE § 9.33

governing the use of self-defense, and that a reasonable jury following the law would also so conclude.⁶⁵

c. Officer Lindeman's Use of Deadly Force in Defense of Third Persons—Tex. Pen. Code § 9.51

The circumstances support our conclusion that Officer Lindeman reasonably believed that Ms. Jester continued to pose a “substantial risk” that she “would cause death or serious bodily injury” to the officers if they intended to take her into custody. Under these circumstances, we conclude that Officer Lindeman’s use of deadly force during this second series of shots fired to effect Ms. Jester’s arrest was justified under Texas Penal Code § 9.51 (a).

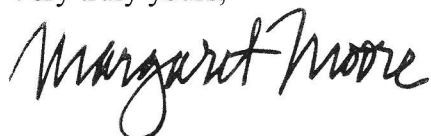
We have reviewed the entire investigation into the circumstances leading to Ms. Jester’s shooting death and Officer Lindeman’s and Officer Smith’s involvement in that incident. We are satisfied that the credible facts have been determined and that we have applied the governing law to those facts. After considering the totality of the circumstances that existed at the time Officer Smith and Officer Lindeman discharged their weapons during both series of shots, we have concluded that their actions were justified and a reasonable jury would so find.

V. CONCLUSION

For these reasons, I have concluded that the filing of criminal charges against Officers Deborah Lindeman and Richard Smith is not supportable under Texas criminal law standards because both officers’ use of deadly force in this incident was justified under the circumstances. Consequently, charges will not be filed. We are closing our review and will take no further action in this matter.

We have released a public/press packet that includes videos, witness statements, officer statements, forensic reports, photos, and an autopsy report. We have also attached the items and legal citations mentioned in the analysis. This decision will be posted on my office’s website and will be accessible under Micah Jester and the date of the incident, October 16, 2016.⁶⁶

Very truly yours,



Margaret Moore

⁶⁵ TEX. PEN. CODE § 9.32.

⁶⁶ <https://www.traviscountytx.gov/district-attorney/cru>.

Appendix

Attachment A – Key to Evidentiary Items Depicted in Figure 9

No.	Evidentiary Item	Location from which recovered
1	Three (3) bullet fragments	Toyota Prius (rear cargo, cargo hatch, car body, and front passenger side cargo area)
2	One (1) Bullet Fragment	Parking lot pavement directly behind (east of) bullet fragments recovered from location #1
3	One (1) .40 cartridge casing	Parking Lot by vehicle on west side of parking lot
4	One (1) .40 cartridge casing	Parking Lot by vehicle on west side of parking lot
5	One (1) .40 cartridge casing	Parking Lot by vehicle on west side of parking lot
6	One (1) 9mm cartridge casing	Parking Lot by vehicle on west side of parking lot
7	One (1) 9mm cartridge casing	Parking Lot by vehicle on west side of parking lot
8	One (1) 9mm cartridge casing	Parking Lot by vehicle on west side of parking lot
9	One (1) 9mm cartridge casing	Parking Lot by vehicle on west side of parking lot
10	One (1) 9mm cartridge casing	Parking Lot by vehicle on west side of parking lot
11	One (1) Bullet Fragment	Walkway under railing by Building 13
12	One (1) Cell Phone	Sidewalk by Building 19
13	One (1) Bullet Fragment	Sidewalk by Building 19
14	One (1) Folding Knife	Sidewalk by Building 19
15	One (1) Strike Marks	Sidewalk
16	One (1) Pellet Gun	Rock landscaping area by Building 19
17	One (1) Bullet Fragment	Sidewalk by Building 19
18	One (1) Bullet Fragment	Rock landscaping by Building 19

19	One (1) Fired Bullet	Sidewalk by Building 19
20	One (1) .40 cartridge casing	Porch area by Building 19
21	One (1) .40 cartridge casing	Underneath vehicle
22	One (1) .40 cartridge casing	Bushes near Building 19
23	One (1) .40 cartridge casing	Bushes near Building 19
24	One (1) Bullet Casing-9mm67	Entrance to Parking Lot
25	One (1) Fired Bullet	Inside the A/C service area of Apartment #1095
26	One (1) Fired Bullet	Inside the A/C service area of Apartment #1095

⁶⁷ Item #24 is believed to be unrelated to the instance case. The incident report indicates that the casing “looked as if exposed to the elements for some time.”